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IN THE MATTER OF THE FORMAL COMPLAINT OF PAC-WEST TELECOMM SEEKING ENFORCEMENT OF THE INTERCONNECTION AGREEMENT BETWEEN PAC-WEST TELECOMM AND QWEST CORPORATION

DOCKET NOS. T-01051B-05-0495
T-03693A-05-0495

OPENING BRIEF IN SUPPORT OF FORMAL COMPLAINT TO ENFORCE INTERCONNECTION AGREEMENT

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Pac-West Telecomm, Inc. ("Pac-West"), provides the following brief in support of its Formal Complaint seeking enforcement of its Interconnection Agreement with Qwest Corporation ("Qwest") (collectively the "Parties").

I. INTRODUCTION

The primary issue presented in this proceeding is simple: Does the Pac-West/Qwest interconnection agreement ("ICA") require Qwest to compensate Pac-West for delivering locally dialed ISP-bound calls from Qwest customers to Pac-West customers? The answer is "Yes." Qwest does not dispute that its obligation to compensate Pac-West for routing calls from Qwest customers is governed by the ICA. The plain language of the ICA requires Qwest to compensate Pac-West at the rate set by the FCC in its *ISP Remand Order*.[1] In the *ISP Remand Order,* the FCC set specific "intercarrier compensation (*i.e.,* the rates) applicable to the delivery of ISP-bound traffic."[2] These rates are applicable to all locally dialed ISP-bound[3] traffic. Because the Pac-West/Qwest ICA expressly incorporates the *ISP Remand Order* rate, and applies that rate to all traffic, including ISP-bound traffic exchanged by the parties, Qwest is contractually obligated to compensate Pac-West at the agreed upon compensation rate for *all* ISP-bound traffic. This case is that simple.

Nevertheless, Qwest seeks to unilaterally award itself an exemption from the clear compensation obligations imposed by the ICA. The "Qwest Exemption" would apply whenever a Qwest customer initiates a local call to a Pac-West customer and that call is

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1 *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order (rel. April 27, 2001) ("*ISP Remand Order*").

2 *Id.* at 78, n.149.

3 In all instances in this brief, the use of "ISP-bound" relies on the definition of presumed ISP-bound traffic in the FCC's *ISP Remand Order.*

routed through the Pac-West switch, when the Pac-West switch is located outside the calling area from which the call originated. Qwest asserts that it does not owe Pac-West reciprocal compensation for this otherwise compensable call. To further muddy the waters, Qwest incorrectly represents that Pac-West seeks compensation for all locally dialed ISP-bound traffic, including calls dialed as toll calls (1+ dialing). This is not correct. Pac-West seeks compensation only for locally dialed traffic that is compensable under the *ISP Remand Order*. The exemption sought by Qwest conflicts with the plain language of the ICA, which sets compensation for all locally-dialed ISP-bound traffic. The Qwest exemption is allegedly targeted to exclude, for purposes of compensation, Qwest customer traffic destined to Pac-West customers, such as ISPs, who are not physically located in the local calling area. However, there are no exemptions providing for differential treatment of any sub-sets of ISP-bound traffic in the ICA, or in the *ISP Remand Order* that it incorporates, nor should the Commission sanction disparate rating rules for an incumbent. The Commission should enforce the plain language of the ICA and bar Qwest from self-declaring an exemption that contradicts the terms of the contract as well as federal law.

II. BACKGROUND

Pac-West and Qwest entered into an amendment to their existing ICA (the "*ISP Amendment*") on May 24, 2002.[4] This amendment was filed with the Commission and became effective by operation of law on May 19, 2003 (Decision No. 66052). Neither Qwest, nor Pac-West were required by statute or rule to amend their ICA to incorporate the

[4] Internet Service Provider ("ISP") Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Pac-West Telecom, Inc. for the State of Arizona (dated May 24, 2002) (The ISP Amendment is attached to the Formal Complaint to Enforce Interconnection Agreement (Docket Nos. T-01051B-05-0495 and T-03693A-05-0495) ("Formal Complaint") as Exhibit B).

terms and conditions of the *ISP Remand Order* issued by the FCC on April 27, 2001. Indeed, Qwest *elected* to enter into this amendment thereby adopting the intercarrier compensation system for ISP-bound traffic set forth in the *ISP Remand Order.* Sections 1.4 and 3.1 of the *ISP Amendment* provide that "'ISP-Bound' is as described by the FCC in the [FCC ISP Order]" and that "Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the [FCC ISP Order]." The FCC-ordered rate for intercarrier compensation is $.0007/mou.[5] Sections 2 and 5 of the *ISP Amendment* also (and independently) obligate the Parties to exchange *all* EAS/Local or any other § 251(b)(5) traffic at the same rate applied to ISP-bound traffic. In plain terms, the *ISP Amendment* requires the Parties to use the FCC-ordered ISP rate for reciprocal compensation for the exchange of all ISP-bound traffic and all other § 251(b)(5) traffic.

In early 2004, Qwest began withholding payment on Pac-West's invoices for compensation alleging that Pac-West had exceeded certain growth ceilings for ISP traffic described in section 3.2.2 of the ISP Amendment. After following the dispute resolution provisions of the ICA, Pac-West and Qwest relied on a private arbitration to resolve this issue (AAA Case #77Y181-00385-02 (JAG Case No. 221368)). While that arbitration was pending, the FCC released its Order in *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, FCC 04-241 (Oct. 8, 2004) ("Core Order"). In the Core Order the FCC found that the growth ceilings were no longer in the public interest and forbore from applying them. On December 2, 2004, the Arbitrator concluded that the growth ceilings expired at the end of 2003, by the terms of the parties' ICA, and that Pac-West was entitled

[5] *ISP Remand Order* ¶ 78.

to full compensation beginning January 1, 2004, without application of any growth ceiling cap. In other words, Qwest's grounds for withholding compensation owed Pac-West in 2004 was rejected. Qwest did not – despite the Arbitrator's order – pay Pac-West the full amount it had withheld.

On December 29, 2004, Qwest notified Pac-West that Qwest intended to continue withholding the money it owed Pac-West, but would assert a new justification for doing so unrelated to the growth ceiling caps. The new basis for refusing Pac-West compensation related to what Qwest called "virtual number" or "VNXX" traffic terminated by Pac-West retroactive to the beginning of 2004. Qwest defines "VNXX" as a competitive local exchange carrier's ("CLEC") provision of local service to a customer in an exchange other than the exchange where the customer is physically located. As stated in the Formal Complaint, Qwest has withheld $443,784.34 owed Pac-West for traffic terminated by Pac-West from January 1, 2004, through May 31, 2005. Qwest now argues that all calls to ISP servers not physically located in the local calling area where the call originated ("VNXX" calls) are exempt from the compensation obligation imposed by the *ISP Amendment* and the *ISP Remand Order.* This unilateral exemption, however, conflicts with the *ISP Amendment,* the arbitrator's decision and finds no support in the *ISP Remand Order.*

III. ARGUMENT

A. Qwest Must Compensate Pac-West for All ISP-Bound Traffic From Qwest Customers Terminated by Pac-West.

1. The Plain Language of the ICA (the *ISP Amendment)* Requires Qwest to Compensate Pac-West for ISP-Bound Traffic Terminated by Pac-West.

The *ISP Amendment* was prepared and executed specifically to address how the parties would compensate one another for ISP-bound traffic under the *ISP Remand Order.*[6] Section 3.1 of the *ISP Amendment* provides as follows:

> Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC's Order on Remand and Report and Order (intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68 (FCC ISP Order), effective June 14, 2001, and usage based intercarrier compensation will be applied as follows: [followed by provisions for identifying ISP traffic. . .]

The plain language of the *ISP Amendment* expressly states that Qwest will pay intercarrier compensation for ISP-bound traffic at the FCC-ordered rates. Further, Pac-West and Qwest elected to apply the FCC-ordered rate to *all* § 251(b)(5) traffic, not just ISP-bound traffic. The FCC-ordered rate for the traffic at issue in this case is $.0007/mou.[7] Qwest was under no obligation to enter into this Amendment or commit to this rate. Qwest *chose* to enter into the *ISP Amendment* and be bound by the rate set forth therein for all ISP-bound calls terminated by Pac-West.

The *ISP Amendment* also leaves no room for confusion with respect to key definitions, specifying that the term "ISP-Bound" is "as described by the FCC in its [*ISP*

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[6] *ICA Amendment* at 1 ("WHEREAS, the Parties wish to amend the Agreement to reflect the aforementioned Order [*ISP Remand Order*] under the terms and conditions contained herein.").

[7] *ISP Remand Order* ¶ 78.

Remand Order]."[8] The *ISP Remand Order* is a lengthy order and carefully scrutinizes how "ISP-Bound traffic" should be categorized for compensation purposes. In the end, the FCC concludes that it does have jurisdiction under section 201 of the Communications Act[9] to provide a compensation mechanism for all ISP-bound traffic, and pursuant to that jurisdiction it set rates and growth caps to be used for intercarrier compensation. Pac-West and Qwest agreed in the *ISP Amendment* to adopt that compensation structure for ISP-bound calls. Nothing has changed regarding that contractual obligation.

Because the *ISP Amendment* is clear and unambiguous with regard to compensation for ISP-bound traffic, the Commission is obliged to interpret it "according to its terms." *Isaak v. Massachusetts Indem. Life Ins. Co.,* 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981). Further, where there is no language in a contract to support the argued position, that position should be rejected. *See U.S. West Communications, Inc. v. Arizona Corporation Commission,* 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996) (rejecting meaning of a settlement agreement advocated by the Commission because "the agreement contained no language to support the [proposed] interpretation and the meaning of the contract must be determined as a matter of law"). Here, the *ISP Amendment* contains no language that limits the applicability of the ISP-bound rate to only a subset of ISP-bound traffic. Likewise, nothing in the *ISP Remand Order* limits the applicability of the rates to only those calls made and received within a local calling area. Because the *ISP Amendment* unambiguously applies to all such traffic, Qwest is obligated to pay the reciprocal compensation owed Pac-West for terminating *ISP-bound traffic.*

[8] *ICA Amendment* at 2.

[9] *See* 47 U.S.C. § 201, Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996; Pub. L. No. 104-104, 100 Stat. 56 ("1996 Act").

2. The *ISP Remand Order* Requires Qwest to Compensate Pac-West for All ISP-Bound Traffic Terminated by Pac-West.

The FCC has taken jurisdiction over ISP-bound traffic. In so doing, the FCC concluded that "traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and [the FCC has] establish[ed] an appropriate cost recovery mechanism for the exchange of such traffic."[10] The first sentence of the first paragraph of the FCC's *ISP Remand Order* announces what the order does and what traffic is affected: "In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs)." Qwest contends that the Order is more limited, applying only to ISPs whose servers are physically located in the same local calling area as the customer placing the dial-up Internet access call. There is no language in the *ISP Remand Order* which supports this argument. Moreover, nowhere in the *ISP Remand Order* does the FCC suggest that its result is limited to a narrow class of ISP traffic.

Under the *ISP Remand Order*, *all* telecommunications traffic is subject to the cost recovery mechanism outlined by the FCC unless it falls within the exemptions established in section 251(g) of the Act.[11] Section 251(g) is inapplicable in this case because Congress intended that § 251(g) apply only to traffic that existed prior to the Act and was subject to intercarrier compensation before the Act (primarily long-distance calls). The traffic at issue here is local traffic and locally-dialed ISP-bound traffic. This traffic did not pre-date the Act and does not qualify for a § 251(g) exemption. This traffic is not, as Qwest

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[10] *ISP Remand Order* ¶ 1.

[11] *ISP Remand Order* ¶ 46.

suggests, akin to a 1+ call to an ISP.[12] Rather, these are locally-dialed calls that are, for all practical purposes, identical to a foreign exchange ("FX") service call placed by a Qwest customer.

The *ISP Remand Order* was issued to set intercarrier compensation for traffic that is bound for ISPs. Qwest argues that the FCC intended in the *ISP Remand Order* to set compensation for those calls that originate and terminate in the same calling area. That argument is not supported by the language of the *ISP Remand Order.* A description of the operational characteristics of ISP-bound traffic in the *ISP Remand Order* is found in Paragraph 10:

> As we noted in the *Declaratory Ruling*, an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area. Customers generally pay their LEC a flat monthly fee for use of the local exchange network, including connections to their local ISP. They also generally pay their ISP a flat monthly fee for access to the Internet. ISPs then combine "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.[13]

The reference to ISP-bound traffic "typically" traveling "through an ISP server located in the same calling area" speaks volumes about what the FCC understood to be the scope of the ISP-bound traffic affected by its Order. The FCC understood that local traffic did not always travel through a switch located in the same local calling area. Knowing this, the FCC had ample opportunity to restrict the applicability of the *ISP Remand Order* rate to calls that originate and terminate in the same local calling area. The FCC did not do this. Instead, the FCC set a rate that was applicable to all ISP-bound traffic, while completely

[12] Qwest Corporation's Answer to Pac-West Telecomm's Complaint to Enforce its Interconnection Agreement, and Counterclaims ¶ 5 ("Qwest Answer").

[13] *ISP Remand Order* ¶ 10 (footnotes omitted).

aware that some ISP-bound traffic traveled through services located outside the originating caller's calling area. Indeed, no language in the *ISP Remand Order* supports Qwest's argument that a locally-dialed call terminated to an ISP server outside the local calling area is ineligible for the ISP-bound traffic reciprocal compensation rate.

Qwest's effort to read additional language into the *ISP Remand Order* also lacks persuasive appeal. The District of Connecticut recently reviewed the same statements on which Qwest relies from the *ISP Remand Order* and the subsequent D.C. Circuit opinion remanding that Order, and concluded that the *ISP Remand Order* applies to all – and not only certain types of – ISP-bound traffic:

> What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*. In answering the question, the FCC: (a) disclaimed the use of the term "local," (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is "information access," (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether "local" ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.[14]

Furthermore, the court explained that "the language of the *ISP Remand Order* is unambiguous – the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and it proceeded to set the intercarrier compensation rates for such traffic."[15] The Commission, like the District Court of Connecticut, should apply the ISP-bound traffic rate to all ISP-bound traffic terminated by Pac-West, consistent with the plain language of the *ISP Remand Order*.

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[14] *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 359 F. Supp. 2d 229, 231-32 (D. Conn. 2005).

[15] *Id.* at 231.

B. Qwest Cannot Unilaterally Exempt a Sub-set of ISP-Bound Traffic From Compensation Obligations Imposed by the Interconnection Agreement.

Qwest argues that calls made from outside the calling area of the called party should be exempt from compensation obligations, even if that call is denominated a local call and otherwise subject to reciprocal compensation obligations. Qwest has contrived this exemption to deny Pac-West compensation for ISP-bound calls to ISP providers who have purchased the Pac-West VNXX service. In this situation the ISP provider is not located in the originating caller's local calling area. Qwest defines VNXX as "a vehicle by which a carrier obtains a telephone number for one local calling area and uses that telephone number in another geographic area."[16] Alternatively, a competitor carrier might define the VNXX service as a network tool that allows a competitive carrier to compete without installing a switch in every local calling area. Regardless of the definition used, Qwest argues that Pac-West VNXX service delivered to a ISP server is not "ISP-bound" traffic because it does not originate and terminate within the same calling area and thus is not a type of traffic the Parties anticipated exchanging under the ICA. As discussed above, this assertion is not supported by the language of the ICA or federal law and reflects Qwest's policy preference, nothing more.

Qwest's opposition to compensation for ISP-bound traffic is also inconsistent with its position on its own FX service – a service functionally identical to the VNXX service. The FX service "provides customers in one rate center with a NPA-NXX assigned to another rate center, so that calls can be placed to and from the FX subscriber to and from

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[16] Qwest Answer ¶ 7, n.2.

customers in the foreign rate center without incurring toll charges."[17] As the definition indicates, the service which Qwest refers to as VNXX provides exactly the same functionality as FX service. Even Qwest concedes that from an end user perspective, FX and VNXX services are indistinguishable.[18]

FX service has been around much longer than VNXX, and was available from Qwest long before carriers, like Pac-West, began offering VNXX service. To illustrate how FX service is used, consider the Sheraton White Horse Pass Resort & Spa (www.wildhorsepassresort.com). This 500 room resort is only 11 miles south of Phoenix but is geographically located in the 520 area code. Desiring local calling to and from all parts of the Valley, seven digit dialing to and from Phoenix, and an affiliation with the Phoenix metro area, the resort ownership purchases FX services from Qwest for the bulk of the telephone numbers used at the resort. The FX service allows these phones to be assigned NPA-NXX numbers in the Phoenix area code (*e.g.* 602-225-0100). In this way, a call from the Phoenix metro area to the Resort – although it physically travels intraLATA between area codes and out of the local calling area – is identified as a local call. Qwest rates and routes these calls as local calls using a comparison of the NPA-NXXs assigned to the customer (not the customer's physical location). With the FX service in place, the caller does not pay toll charges and the originating carrier does not pay terminating access (as it would if the Resort had not been assigned a NPA-NXX number from the Phoenix

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[17] *In re Petition for Arbitration of AT&T Communications of the Mountain States*, Docket No. T-02428A-03-0553 ("AT&T Arbitration"), Decision No. 66888 at 5 (April 6, 2004).

[18] Exhibit A, Qwest Responses to Pac-West Data Request No. 01-021 (Selected discovery propounded and answered in the Washington VNXX case will, by agreement of the parties, be used in this case. This is intended to avoid duplicative discovery in Arizona. These responses are included in Exhibit A to this Brief).

metro area). The call is rated as a local call based on the NPA-NXX.[19] This background on FX service provides some context for Qwest's unilateral assertion that Pac-West is not entitled to compensation for VNXX traffic.

In its Answer to Pac-West's Formal Complaint, Qwest raised various arguments in favor of the unilateral exemption that it has proposed. None are valid.

1. The "ESP" Exemption Does Not Make an ISP-Bound Call a Toll Call.

Qwest argues that ISPs are a subset of enhanced service providers ("ESPs") whose location for call rating purposes has historically been the physical location of the ESP computers receiving the telephone calls. Thus, according to Qwest, calls made to ESPs by customers physically located in a different local calling area have been considered toll calls and section 251(g) of the 1996 Act preserves such treatment. This argument, however, was squarely rejected by the D.C. Circuit Court of Appeals in May 2002. The federal appeals court remanded the *ISP Remand Order* because it rejected the FCC's argument that ISP-bound traffic is subject to § 251(g). The court observed that § 251(g) "appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection

[19] Qwest offers several services that provide FX functionality. (Exhibit A, Qwest Responses to Pac-West Data Request Nos. 01-005 & 16). In addition to a pure FX service, for example, Qwest offers a Market Expansion Line ("MEL") product, which Qwest describes as "a remote call forwarding 'feature' that allows a customer to call forward their service to a different location without requiring a physical location in that area." (Exhibit A, Qwest Responses to Pac-West Data Request No. 01-016). The MEL customer pays toll charges for calls forwarded to a different local calling area, but if a CLEC subscriber places the call to the MEL customer, the call is "treated as a local call for intercarrier compensation purposes." *Id.* Even though it is an interexchange call and Qwest is providing its MEL customer with toll service, the CLEC does not receive the originating access charges to which it otherwise would be entitled. Qwest fails to explain why its MEL product – or any other call forwarding feature that treats toll calls as local calls for intercarrier compensation purposes – is acceptable, but the VNXX system employed by Pac-West is unlawful.

restrictions and obligations.'"[20] The court, however, also found that "nothing in § 251(g) seems to invite the [FCC's] reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rules it adopted were in some way, however remote, linked to the LECs' pre-Act obligations."[21] More specifically, the court concluded that § 251(g) *does not apply* to ISP-bound traffic exchanged between LECs:

> [I]t seems uncontested – and the [FCC] declared in the Initial Order – that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. The best the [FCC] can do on this score is to point to pre-existing LEC obligations to provide interstate access to ISPs. Indeed, the [FCC] does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided "to interexchange carriers and information service providers"; LECs' services to other LECs, even if en route to an ISP, are not "to" either an IXC or to an ISP.[22]

By law, ISP-bound traffic is not § 251(g) traffic and the compensation regime applicable then to § 251(g) traffic is not applicable to ISP-bound traffic. This traffic is subject to the § 251(b)(5) compensation structure (reciprocal compensation) or, as in this case, the very simple and straight-forward negotiated contractual rate for ISP-bound traffic.

Qwest may attempt to argue that Pac-West is acting as an IXC, thus rendering the D.C. Circuit's analysis inapplicable. This argument fails from the beginning, however, based on the court's finding that there was *no* federal interconnection or compensation scheme for any ISP-bound traffic prior to passage of the Act and thus nothing to preserve. Even were that not the case, Pac-West is not acting as an IXC, but rather is operating in the same capacity as any other LEC – providing FX service.

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[20] *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 432 (D.C. Cir. 2002).

[21] *Id.* at 433.

[22] *Id.* at 433-34 (emphasis in original) (citations omitted).

Qwest does not dispute that telephone calls, both historically and up to the present day, are rated and routed based on the telephone numbers of the calling and called parties. Prior to and following passage of the Act, Qwest has exchanged such traffic with other LECs as local, not toll, traffic, without regard to the physical location of either of the parties to the call.[23] When Qwest's customers and Pac-West's customers have telephone numbers assigned to the same local calling area, therefore, the traffic exchanged between them has been, and continues to be, considered local, not interexchange, traffic regardless of the physical location of those customers. Accordingly, § 251(g) does not apply to that traffic.

2. The Arizona AT&T/Qwest Arbitration Decision Is Not Controlling.

Qwest has argued that the AT&T/Qwest Arizona arbitration order issued in April of 2004, by the Commission is key to resolving this dispute.[24] For three reasons that order is not determinative in this case. First, the AT&T case dealt prospectively with an ICA that had not yet been approved or implemented. AT&T and Qwest were effectively litigating what contractual terms could be included in the ICA. This is markedly different than Pac-West's effort to enforce terms in an ICA that were already agreed upon by the Parties. The Pac-West/Qwest ICA contains binding contractual terms that the Commission is obliged to interpret and enforce. The terms and conditions contained in the Pac-West ICA may be enforceable against Qwest even if they are judged ineligible for insertion in a new ICA.

Second, in the AT&T arbitration, compensation for VNXX traffic bound for an ISP was never at issue. AT&T and Qwest sought clarification regarding the definition of

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[23] *See* Exhibit A, Qwest Responses to Pac-West Data Request Nos. 01-006 & 7.

[24] Qwest Answer at 12-13 (citing *In re AT&T Communication of the Mountain States, Inc.* Docket No. T-02428A-03-0553) (April 6, 2004) Decision No. 66888.

"Exchange Service," but did not seek to arbitrate an ICA provision that addressed intercarrier compensation for FX or VNXX services. Likewise, the parties were not arbitrating the appropriate intercarrier compensation rate for ISP-bound traffic. Indeed, the *ISP Remand Order* was never applied or even discussed. Only the definition of "Exchange Service" was addressed, and even that analysis was truncated because the question before the Commission was narrow and not presented in the context of a carrier compensation dispute.

Finally, the most telling segment of the portion of the AT&T order on this topic is the resolution passage which draws attention to the Commission's reluctance to decide in the arbitration order "a future dispute concerning treatment of AT&T's VNXX service which may or may not arise under that provision." Acknowledging, but not resolving the VNXX compensation problem the Commission invited AT&T to file a complaint if AT&T thought that "Qwest is acting discriminatorily or otherwise unlawfully." The AT&T Order does not prevent the Commission from enforcing the Pac-West ICA and, in fact, it highlights that the Arizona Commission predicted that there would be a need for future enforcement actions to restrain discriminatory conduct by Qwest.

3. Qwest's Historic Practice of Paying Pac-West Inter-Carrier Compensation Undermines its New Argument.

Qwest's own conduct under the ICA further belies Qwest's current interpretation of the agreement. Qwest admits that Pac-West and Qwest have been exchanging traffic, including all ISP-bound traffic between telephone numbers in the same local calling area, pursuant to the ICA since February 2001.[25] December 29, 2004, was the earliest date on which Qwest notified Pac-West and other interconnecting carriers of Qwest's position that

[25] Qwest Answer ¶ 54.

FX ISP-bound traffic is not subject to compensation – almost four years after Qwest began exchanging traffic with Pac-West under the current ICA.[26] Prior to January 2004, Qwest did not contend that FX ISP-bound traffic was not subject to compensation, and argues now that the amount of such traffic was "insignificant" under the growth cap provisions of the ICA "and was irrelevant to the billing by Pac-West to Qwest."[27] Such belated claims do not withstand scrutiny.

Qwest states that it "cannot completely determine for any given call whether the call is destined for a location within the local calling area or in a different local calling area. Qwest only knows how far it carried the call before handoff to the interconnected carrier, where the carrier's serving switch is located, and whether the traffic is one-way or two-way."[28] By its own admission, Qwest cannot calculate the amount of FX ISP-bound traffic Qwest sends to Pac-West. Qwest thus asks the Commission to believe that by sheer coincidence, the amount of FX ISP-bound traffic is, and has been, the traffic in excess of the growth caps the FCC established three years ago for all carriers. Such a contention simply is not credible. Qwest obviously disagrees with the FCC's decision to eliminate the growth caps on ISP-bound traffic and is grasping for some other way to impose the same limitations. The Commission should see Qwest's new-found concern with Pac-West's FX ISP-bound traffic for what it is and should require that Qwest continue to compensate Pac-West for all locally-dialed ISP-bound traffic as Qwest has done for over four years.

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[26] Formal Complaint, Exhibit D.

[27] Qwest Answer ¶ 54.

[28] *Id.* ¶ 53.

4. Public Policy Supports Enforcement of the *ISP Remand Order.*

The language of the ICA, along with federal and state law, supports Pac-West's Petition and its claims for relief. Qwest, however, asserts that "this case raises an important issue from a policy and financial perspective,"[29] contending that compensating Pac-West for FX ISP-bound traffic "would lead to severe financial repercussions for the industry, would erode the financial support that originating access provides to local rates, and would further distort the compensation scheme (including universal service funding) underlying the public switched telephone network."[30] Qwest fails to provide any support for this Chicken Little scenario, which in any event is a topic for the FCC's ongoing intercarrier compensation docket, not an individual state ICA enforcement proceeding.[31] If, as Qwest has alleged, there is a problem with the inter-carrier compensation system, the FCC docket on that topic is the correct forum for changing the incentives embedded in the compensation system. The Commission's task is to apply the law, and leave to the FCC the task of reforming and adjusting carrier compensation incentives.

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[29] *Id.* ¶ 15.

[30] *Id.* ¶ 17.

[31] The FCC recently addressed Qwest's concerns in the CORE order when it lifted all previous imposed restrictions on compensation for ISP traffic:

> Recent industry statistics indicate, however, that this expansion is not likely to occur given declining usage of dial-up ISP services. For example, one recent report suggests that the number of end users using conventional dial-up to connect to ISPs is declining as the number of end users using broadband services to access ISPs grows.56 We do not anticipate, therefore, that the availability of compensation to carriers that serve ISPs will have any material impact on the migration of consumers from dial-up services to broadband services. Thus, we now conclude that the policies favoring a unified compensation regime outweigh any remaining concerns about the growth of dial-up Internet traffic.

Core Order, para. 21.

5. Qwest's Proposal Would Deny Pac-West the Opportunity to Provide Service to Customers Who Are Located in a Different Calling Area.

Qwest effectively ignores the negative consequences and impacts of its proposal to disregard the ICA and federal law. "Qwest offers ISPs the ability to have a local number presence in a given local calling area that connects to the ISP's modem bank in another local calling area."[32] Qwest does not even know how many ISP customers it serves "because they do not necessarily identify themselves as ISPs."[33] Qwest thus provides exactly the same service to ISP customers that Pac-West provides, and Qwest seeks to competitively disadvantage Pac-West by increasing Pac-West's costs to serve such customers through not only denying Pac-West compensation for FX ISP-bound traffic, but also proposing to impose access charges for that traffic.

Pac-West, of course, would not be liable for access charges on most, if not all, of this traffic. To use the Commission's example, if Pac-West were providing service to an ISP whose server is physically located in Phoenix but who has customers in Payson who obtain their local service from Qwest, Qwest would be acting as the interexchange carrier and paying terminating access charges to Pac-West. Qwest, in turn, would impose toll charges on its customers in Payson, who almost certainly would then discontinue using the ISP, and the ISP would reduce or eliminate the services it obtains from Pac-West.

The result would be fewer – or possibly no – alternatives for dial-up Internet access outside the Arizona metropolitan areas. The vast majority of consumers will not pay toll charges to use the Internet. ISPs, therefore, will be forced to: (a) obtain FX service from

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[32] *In re Petition for Arbitration of AT&T with Qwest*, Washington St. Utilities and Trans. Comm. Docket No. UT-0333035 ("*AT&T Arbitration*"), Order No. 4, Arbitrator's Report ¶ 32 (Dec. 1, 2003).

[33] Exhibit A, Qwest Responses to Pac-West Data Request No. 01-011.

Qwest; (b) incur substantial costs to deploy servers in every local calling area; or (c) discontinue offering service in certain areas – which inevitably will be the rural areas of the state. Qwest is the only one who comes out ahead in these circumstances. Qwest's business services in most of its central offices have been classified as competitive, which would permit Qwest to charge excessive rates to ISPs for FX services if CLECs effectively cannot offer an alternative. Qwest has at least one affiliate that provides dial-up ISP services,[34] so even if ISPs choose to abandon areas rather than pay Qwest's FX rates, Qwest can be assured that its affiliate will obtain service from Qwest, given that the money is being transferred from one pocket to another. That affiliate, moreover, would then be free to charge a higher rate for dial-up Internet access in those areas where it does not face competition.

Consumers and competitors are the losing parties under Qwest's proposal. Consumers in less populated areas will pay more for Internet access. ISPs will also pay more, or more likely forego, serving these rural areas where consumers already have fewer internet access alternatives. CLECs will be limited in their ability to provide services to ISPs accordingly. The FCC is wrestling with these and many other policy issues that arise from the current Rube Goldberg-inspired intercarrier compensation scheme. In the meantime, the Commission should enforce the ICA as written and in conformance with current federal law, and should require Qwest to pay Pac-West the compensation required under the *ISP Remand Order* for all ISP-bound traffic between telephone numbers that are assigned to the same local calling area.

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[34] *Id.* No. 01-003.

6. Qwest Incorrectly Argues That the *ISP Remand Order* Restricts Reciprocal Compensation Based on the Physical Path of the Call.

Qwest contends that the *ISP Remand Order* was limited, applying only to ISPs whose servers are physically located in the same local calling area as the customer placing the dial-up Internet access call. In an arbitration conducted on this issue in Washington State, the Washington Utilities and Transportation Commission rejected this very argument. As the Arbitrator explained after quoting the first sentence of the *ISP Remand Order*,

> The FCC's order, thus, introduces its subject matter as encompassing all telecommunications traffic delivered to ISPs and not some subset of that universe as CenturyTel contends. The FCC's order is consistent in this regard throughout its discussion and nowhere suggests that its result is limited to the narrow class of ISP-bound traffic that CenturyTel argues is the scope of its application. It is the case, as CenturyTel argues, that both the FCC and the appeals court refer to the traffic that terminates at an ISP within the caller's local area, but they do so not to limit their scope to this subset of ISP-bound calls. Rather, both emphasize that even when the traffic remains in the local area it is not to be treated for compensation purposes as local traffic.[35]

This outcome was repeated more recently in *Pac-West Telecom, Inc. v. Qwest Corporation*, where in the recommended opinion the Arbitrator issued the following recommendation:

> This Order adopts Pac-West's interpretation of the scope of "ISP-bound" traffic described by the FCC in the *ISP Remand Order*. Specifically, ISP-bound calls enabled by VNXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements. This interpretation is consistent with the Commission's decision in the *Level 3 Arbitration*, as well as a recent of the U.S. District Court for the District of Connecticut.[36]

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[35] *Level 3 Arbitration*, Fifth Supplemental Order, Arbitrator's Report and Decision, Docket No. UT-023043 ¶ 35 (Jan. 2, 2003) (attached as Exhibit B).

[36] *The Southern New England Telephone Company*, 359 F. Supp. 2d 229.

In the District of Connecticut opinion mentioned by the Washington Arbitrator, the Court reviewed the same statements on which Qwest relies from the *ISP Remand Order* as well as the subsequent D.C. Circuit opinion remanding that Order, and the court reached essentially the same conclusion:

> What these statements, taken by themselves, do not reveal is how the FCC proceeded to answer that question in the *ISP Remand Order*. In answering the question, the FCC: (a) disclaimed the use of the term "local," (b) held that all traffic was subject to reciprocal compensation unless exempted, (c) held that all ISP-bound traffic was exempted because it is "information access," (d) held that all ISP-bound traffic was subject to the FCC's jurisdiction under section 201, and (e) proceeded to set the compensation rates for all ISP-bound traffic. In short, though the FCC started with the question whether "local" ISP-bound traffic was subject to reciprocal compensation, it answered that question in the negative on the basis of its conclusion that all ISP-bound traffic was in a class by itself.[37]

The court concluded that "the language of the *ISP Remand Order* is unambiguous – the FCC concluded that section 201 gave it jurisdiction over all ISP-bound traffic, and it proceeded to set the intercarrier compensation rates for such traffic."[38] This Commission, like the Connecticut District Court and the Washington Utilities and Transportation Commission, should confirm that the *ISP Remand Order* applies to all locally dialed ISP-bound traffic without regard to the path of the call.

7. In Addition to Having No Basis in Law, Qwest's Proposed Outcome Would Be Impossible to Administer.

Qwest contends that a call from a CLEC customer to a Qwest FX customer "is an interexchange call for which no reciprocal compensation should apply."[39] The fact is that reciprocal compensation currently does apply to that call. Even if Qwest were proposing to

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[37] *Id.* at 231-32.

[38] *Id.* at 231.

[39] *Id.*

change that and to pay CLECs access charges for such calls – which Qwest is not proposing – it would be an administrative impossibility. Calls are rated and routed based on the telephone numbers of the calling and called parties. No carriers exchange data concerning the actual physical location of those parties because the current system is not set up to do so.[40] Moreover, the technology doesn't exist to reliably capture the physical location of both parties to a call. Nor would it add any value to consumers to have such data. Qwest proposal if applied non-discriminatorily, and not just to CLECs such as Pac-West, would require a massive overhaul of every carrier's systems. The only way to ensure that all interexchange calls are rated as toll calls would be to assign every customer of every carrier with telephone numbers that strictly correspond to the customer's physical location at the time of the call. That would mean the elimination of all FX service or features, including call forwarding to telephone numbers outside the customer's local calling area. Qwest, of course, proposes nothing of the kind, and until it does, the Commission should view as self-serving and anticompetitive Qwest's proposal to treat CLEC FX services and functionalities differently than Qwest treats its own comparable services and features.

C. The Commission Should Dismiss Qwest's Counterclaims.

Qwest raises four counterclaims in response to Pac-West's Formal Complaint. The Commission should conclude that they are without merit. All of these counterclaims are variations on the same theme that FX ISP-bound traffic is not subject to compensation under the *ISP Remand Order*. Pac-West has thoroughly discussed this issue in its Formal Complaint, but provides a limited discussion in response to each of Qwest's counterclaims.

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[40] *See* Exhibit A, Qwest Responses to Pac-West Data Request Nos. 01-007, 20 & 22.

As Pac-West has explained, Qwest's position is unsustainable in light of the Parties' ICA and the *ISP Remand Order.*

1. Pac-West Has Not Violated Federal Law.

Not surprisingly, Qwest cites no specific federal law that Pac-West has violated through its use of telephone number resources or in seeking compensation for FX ISP-bound traffic. There is no such law. No federal law prohibits a carrier from assigning a telephone number associated with one local calling area to a customer who is physically located in a different local calling area. Indeed, Qwest would be in violation of any such law. Similarly, Qwest seeks compensation from Pac-West and other CLECs for calls made to customers using Qwest's FX service and features, including ISPs. Pac-West is not in violation of federal law for doing the same thing. Furthermore, any alleged violation of federal law relating to the administration of numbering is within the exclusive jurisdiction of the FCC (or its delegate) and is not properly before the Arizona Corporation Commission. 47 U.S.C. § 251(e)(1).

2. Pac-West Has Not Violated State Law.

Arizona law, like federal law, also does not preclude assigning telephone numbers for FX services or seeking compensation for calls made to customers of such services. Qwest cites no authority for the proposition that the Commission even has jurisdiction over how a carrier assigns telephone numbers to its customers, much less any statutes, rules, or Commission decisions establishing substantive requirements for customer number assignments. At a minimum, it is incumbent upon Qwest to raise this issue with the FCC, the North American Numbering Council, the North American Numbering Plan Administrator, or some other body with responsibility for national numbering issues prior to asking the Commission to establish its own requirements for one carrier in one state.

Qwest has not done so,[41] and the Commission should not entertain Qwest's claim at least until Qwest has pursued that claim in a more appropriate forum.

3. Pac-West Has Not Violated Section 2.1.4.6 (Attachment 5) of the ICA.

Qwest's claim that Pac-West has violated provisions of the ICA concerning numbering resources borders on the frivolous. The recognition in section 2.1.4.6 that "[e]ach Party is responsible for administering NXX codes assigned to it" does nothing more than clarify that each Party is responsible for its own number resources. That section cannot reasonably be construed to create an independent contract obligation with respect to how a party obtains or uses telephone numbers. Similarly, the ICA requirement that each party provide all required information for the local exchange routing guide ("LERG") does not create a contractual duty to the other party to comply with all LERG requirements. Qwest cannot reasonably argue to the contrary.

Even if there were a contractual duty with respect to a party's use of numbering resources – and there is not – Pac-West has not violated any such obligation. Qwest contends that Pac-West's use of number resources is not consistent with industry guidelines, specifically section 2.14 of the Central Office Code (NXX) Assignment Guidelines ("COCAG") which

> assumes "from a wireline perspective that CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. *Exceptions exist, for example tariffed services such as foreign exchange service.*"[42]

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[41] *See* Exhibit A, Qwest Responses to Pac-West Data Request No. 01-018.

[42] *Id.* No. 01-017 (emphasis added).

Pac-West, like Qwest, provides FX service to its customers, including ISPs, and its use of numbering resources is fully consistent with the industry guidelines.

4. Pac-West Is Not Improperly Routing Traffic Over LIS Trunks.

Qwest claims that Pac-West is improperly having Qwest route FX ISP-bound traffic over Local Interconnection Service ("LIS") trunks because such traffic does not "fit in any of the[ ] categories" of traffic that may be exchanged over LIS trunks. As Pac-West explained above, however, FX ISP-bound traffic is included within the definition of EAS/Local Traffic, and is covered by the ISP Amendment to the ICA. Indeed, Qwest has Pac-West and other LECs send traffic bound for Qwest's FX customers over LIS trunks. Both parties have delivered traffic rated as local over the LIS trunks since they began exchanging traffic under the ICA in 2001. Qwest has no basis for claiming now, over six years later, that Pac-West may no longer have Qwest route FX ISP-bound traffic over those trunks while Qwest may continue to have Pac-West route the same type of traffic to Qwest over those same trunks.

5. Binding Arbitration Has Already Determined That the ICA Does Not Require an Amendment to Incorporate the FCC's *Core* Decision.

Qwest requests that the Commission "Direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*."[43] Qwest, however, raises no claim in its Answer that would support such

relief. Nor could Qwest raise such a claim. The parties have already undertaken binding arbitration on this issue, and the Arbitrator concluded that no amendment to the ICA is

[43] Qwest Answer ¶ 70D.

necessary.[44] Qwest, therefore, is precluded from relitigating this issue before the Commission, and the Commission should dismiss this request for relief, along with all of Qwest's counterclaims.

IV. CONCLUSION

Qwest disagrees with the FCC's decision to eliminate the growth caps on the amount of ISP-bound traffic subject to compensation under the *ISP Remand Order*. Having lost at the FCC, Qwest has invented a way to circumvent the FCC's decision and effectively re-impose those caps – withhold compensation for FX ISP-bound traffic. Qwest's creativity conflicts with the *ICA Amendment* and the *ISP Remand Order*. The Commission, therefore, should enforce the ICA and require Qwest to: (a) compensate Pac-West at the rates specified in the agreement for all §251(b)(5) traffic including all ISP-bound traffic that is exchanged between calling parties with telephone numbers assigned to the same local calling area; and (b) pay Pac-West all compensation that Qwest has withheld based on Pac-West's calculations.

RESPECTFULLY SUBMITTED this 14th day of September, 2005.

OSBORN MALEDON PA

By Joan S. Burke

Joan S. Burke
2929 North Central, Suite 2100
Phoenix, Arizona 85012
(602) 640-9356
Attorneys for Pac-West Telecomm, Inc.

[44] Formal Complaint, Exhibit C, Affidavit of Ethan Sprague (Arbitrator's Decision).

ORIGINAL and 15 copies of the foregoing
filed this 14th day of September, 2005 with:

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ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 14th day of September, 2005 to:

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A

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-003

REQUEST:

Does any Qwest affiliate provide dial-up Internet access service in Washington? If so, please provide the following information:

a. The identity of the affiliate(s), the name(s) of such service, and the tariff, price list, or contract provisions governing that service; and

b. The physical location of each Qwest affiliate ISP Server or modem bank and the geographic area from which calls rated as local are routed to that Server or modem bank.

RESPONSE:

a. Qwest !nterprise America, Inc. offers retail, dial-up Internet access under the brand name "MSN Dial-Up Powered by Qwest." For further information, please refer to http://pcat.qwest.com/pcat/productDetail.do?salesChannel=Residential&offerld=6627

Qwest Communications Corporation offers ISPs a wholesale dial access product. For further information, please refer to: http://www.qwest.com/pcat/partners/product/1,1016,2097_6_12,00.html

b. See response to PWT 01-012.

Respondent: Mary LaFave

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-005

REQUEST:

Does Qwest provide any service in which the customer has a telephone number assigned to a local calling area other than the local calling area in which the customer is physically located? If so, please provide the following information:

a. The name(s) of each such service and the tariff, price list, or contract provisions governing each service;

b. The physical location of each customer receiving any such service, the customer's telephone number(s), and the local calling area to which the telephone number(s) is/are assigned; and

c. An explanation of how calls between the customers of those services and customers of other carriers are rated and routed, including but not limited to the compensation Qwest pays or receives from the other carriers.

RESPONSE:

Yes. Qwest offers Foreign Exchange (FX) service and Primary Rate Service (PRS-Integrated Services Digital Network) with FCO or FX in Washington.

(a) Please refer to the Washington Exchange and Network Services Tariff for the provisions for Foreign Exchange Service and Primary Rate Service with FCO or FX.

(b) Qwest objects to this request insofar as it seeks individual customer information (CPNI) regarding FX subscribers that is not relevant to the dispute in this case and is not reasonably calculated to lead to the discovery of admissible evidence. FX service is very different from VNXX and in addition comprises only a miniscule part of Qwest's subscriber base. This traffic is a recognized exception to the NPA-NXX geographic numbering conventions and Qwest believes that such traffic is de minimus.

(c) For FX service, the customer purchases an FX connection in the local calling area in which the customer seeks a local number. All calls to and from other customers in the same local calling area where the FX customer purchased a connection are treated as local. All calls to and from customers outside the local calling area where the FX customer's connection was purchased are treated as toll calls. The additional transport for carrying calls from the local calling area where the connection was purchased, to the FX customer's location, is ordered as a private line tariffed service. When a retail customer of another carrier in local calling area one (LCA 1) places a call to a FX customer's number in LCA 2, the call is routinely dialed with a "1" as the first digit and classified as usage-sensitive toll, and the appropriate inter-carrier charges associated with the call would apply.

With Primary Rate Service, the customer can receive dial tone from a switch that is not in the customer's local wire center. If the switch is in a wire center in the same exchange, the customer can order a Foreign Central Office. If the switch is in a wire center in a different exchange, the customer can order Foreign Exchange. Either way, the customer would pay **Intrastate** DS1 mileage between the wire centers. The transport mileage rate element would come from the state tariff, price list, catalog or ICB contract, whichever is applicable for the DS1 Service in the state. The customer will continue to pay normal charges on the PRS (with the added cost of the DS1) **Intrastate** fixed and per mile rates for transport mileage.

Respondent: Larry Brotherson

QWEST CORPORATION
STATE: Washington
DOCKET NO: Docket No. UT-053036
CASE DESCRIPTION: Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR: Pac-West Telecomm, Inc.
REQUEST NO: PWT 01-006

REQUEST:

If Qwest charges rates for any of the services identified in response to Request No. 6 that are higher than the rates for comparable service provided to customers physically located within the local calling area with which their telephone numbers are associated, please identify the amount of that higher rate that Qwest provides to local exchange carriers who would otherwise be entitled to switched access charges for originating calls to, and terminating calls from, the Qwest customers located outside the local calling area.

RESPONSE:

Qwest charges the retail FX customer the same rates for FX service as other comparable retail services (i.e. local exchange rates and private line transport rates). Switched access charges are not applicable to the end user purchasing the FX Private Line Transport service. Please refer to Request No. 5 for an explanation of inter-carrier charges associated with calls between two different LCAs and local exchange carriers. Local calls between two local exchange carriers in Washington are exchanged at Bill and Keep. For "jointly provided" FX services between Qwest and three Independent Companies in Washington, Qwest meet point bills the Private Line Transport service (each company bills their own portion of the service). For all other jointly provided FX services with other carriers in Washington, Qwest is considered the "Designated Toll Provider". As the Designated Toll Provider, Qwest bills the end user customer for the service end-to-end as if all locations are in Qwest territory at Qwest's current tariff rates. The Independent Companies then submit a separate bill to Qwest for their portion of the jointly provisioned service at the ILEC's prevailing rates.

Respondent: Larry Brotherson

QWEST CORPORATION
STATE: Washington
DOCKET NO: Docket No. UT-053036
CASE DESCRIPTION: Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR: Pac-West Telecomm, Inc.
REQUEST NO: PWT 01-007

REQUEST:

Does Qwest exchange local traffic with any other incumbent local exchange carrier ("ILEC") in Washington? If so, (a) what customer location information do Qwest and the other ILEC(s) provide each other for purposes of rating and routing the traffic they exchange; and (b) how does Qwest compensate the other ILEC(s) for calls between the ILECs' customers in a local calling area and Qwest customers whose telephone numbers are associated with that local calling area but who are physically located in another local calling area?

RESPONSE:

Yes. (a) Qwest does not provide customer location information or call records to other ILECs for local calls in Washington. (b) Compensation for traffic exchanged with other ILECs within the local calling area is handled under a Bill and Keep arrangement. For inter-carrier compensation arrangements refer to PWT 01-006.

Respondent: Larry Brotherson

QWEST CORPORATION
STATE: Washington
DOCKET NO: Docket No. UT-053036
CASE DESCRIPTION: Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR: Pac-West Telecomm, Inc.
REQUEST NO: PWT 01-011

REQUEST:

How many ISP customers does Qwest serve in the state of Washington?

RESPONSE:

Qwest objects to this data request on the basis that the number of ISP customers it serves is not relevant in this case as Qwest is not seeking compensation for ISP-bound traffic. Without waiver of this objection, Qwest is unable to identify the number of end users it sells retail services to who operate as ISPs because they do not necessarily identify themselves as ISPs.

Respondent: Legal
Mary LaFave

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-016

REQUEST:

If a Pac-West customer in Seattle were to place a call to a Qwest customer who is physically located in Tacoma or Olympia, but who has a Seattle telephone number through a Market Expansion Line or similar arrangement, what intercarrier compensation mechanism should apply, in Qwest's view, and why? Would your answer be different if the Qwest customer is an ISP? If so, why?

RESPONSE:

Qwest's Market Expansion Line (MEL) is a remote call forwarding "feature" that allows a customer to call forward their service to a different location without requiring a physical location in that area. Calls to MELs are forwarded automatically from the central office ("CO") to another telephone number of the customer's choice. This is no different than any customer call forwarding their line to another location. Calls can be forwarded to either a local or long distance number. In the example provided, when a Pac-West customer in Seattle dials a Seattle telephone number, the call is handed off to Qwest in Seattle. The MEL customer utilizing the remote call forwarding feature of their service pays the applicable toll charges from the MEL CO to the terminating telephone, no different than any other customer that call forwards their telephone number to a different location. A call from the Pac-West customer in Seattle to a MEL customer with a Seattle number would be treated as a local call for intercarrier compensation purposes.

Functionally similar to MEL, but rather different from an architecture and compensation standpoint is Foreign Exchange ("FX") service. Unlike MEL, for a customer ordering FX service, the call is routed to the CO in which the called party number resides. That call is then routed over a dedicated facility to a distant CO, which then terminates the call to the customer who ordered the FX service. For this service, as with VNXX, the appropriate treatment of the call would be that this is an interexchange call for which no reciprocal compensation should apply.

Calls to an ISP would not be compensable under the ISP-Remand Order unless the ISP had a server or modem bank in the same local calling area as the calling party.

Respondent: Larry Brotherson

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-017

REQUEST:

Please identify each and every numbering requirement or guideline with which Qwest alleges that Pac-West is not in compliance as stated in paragraph 58 of Qwest's Answer. For each such requirement or guideline, please explain (a) why Pac-West's assignment of telephone numbers is inconsistent with that requirement or guideline; and (b) why Qwest's assignment of telephone numbers associated with a local calling area to customers who are not physically located in that local calling area is consistent with that requirement or guideline.

RESPONSE:

(a) Pac-West's misassignment of telephone numbers is not consistent with the telecommunications industry's numbering resource guidelines. For example, the Alliance for Telecommunications Industry Solutions (ATIS) Central Office Code (NXX) Assignment Guidelines (COCAG) (section 2.14) assumes "from a wireline perspective that CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. Exceptions exist, for example tariffed services such as foreign exchange service." (Emphasis added.) VNXX is not identified as an exception. In addition, section 4.2.6 of the COCAG provides that "[t]he numbers assigned to the facilities identified must serve subscribers in the geographic area corresponding with the rate center requested." (Emphasis added.) Finally, "geographic NPAs" are the "NPAs which correspond to discrete geographic areas within the NANP [North American Numbering Plan]," while "non-geographic NPAs" are "NPAs that do not correspond to discrete geographic areas, but which are instead assigned for services with attributes, functionalities, or requirements that transcend specific geographic boundaries," "the common examples [of which] are NPAs in the N00 format, e.g., 800." COCAG, § 13.0.

(b) Qwest's assignment of telephone numbers associated with a local calling area to customers who are not physically located in that local calling area is consistent with the industry guidelines because such guidelines specifically recognize tariffed exceptions like foreign exchange service, but do not recognize VNXX. These guidelines are very recent, having been issued in June 2005. The absence of any reference to VNXX as an exception to the geographic assignment of numbers, at a time when the issue is being hotly debated in various for a, indicates to Qwest that the guidelines do not recognize VNXX as an exception in the same manner that FX services are recognized.

Respondent: Legal

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-018

REQUEST:

Please identify all complaints, formal disputes, or other measures that Qwest has taken to raise the issues identified in paragraph 58 of its Answer with the FCC, the North American Numbering Council, the numbering administrator, or any other body with jurisdiction or authority over NPA/NXX assignments.

RESPONSE:

Qwest objects to this data request on the grounds that it is overly broad. Without waiver of this objection, Qwest responds as follows: It is virtually impossible for Qwest to identify all "measures" that Qwest may have taken to raise the issues identified in paragraph 58 of the answer with respect to a CLEC's improper NPA/NXX assignments or use of VNXX. For example, Qwest is currently involved in a number of interconnection enforcement petitions or complaints and interconnection agreement arbitrations in various states with Level 3 in which these issues are being litigated. Further, Qwest and AT&T recently engaged in a series of interconnection agreement arbitrations in numerous states in which AT&T attempted to expand the definition of local exchange service to include VNXX schemes. Finally, Qwest was involved in a docket (Docket No. SPU-02-11, SPU-02-13), and submitted testimony, before the Iowa Utilities Board ("IUB"), in which the Board denied challenges to the North American Numbering Plan Administrator decision to deny Level 3 the use of numbering resources because Level 3 proposed to use the requested numbers to provide VNXX services. The IUB found that VNXX is not an authorized local service and the proposed use of telephone numbers would be inconsistent with applicable standards and guidelines. Certain aspects of the Board's order have been appealed, and the appeal is still pending.

Respondent: Legal

QWEST CORPORATION
STATE: Washington
DOCKET NO: Docket No. UT-053036
CASE DESCRIPTION: Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR: Pac-West Telecomm, Inc.
REQUEST NO: PWT 01-020

REQUEST:

Are Qwest's network and billing systems capable of routing and rating traffic based on the calling parties' physical locations, rather than their respective NPA/NXXs? If so, please describe how.

RESPONSE:

In the majority of cases Qwest rates calls based upon the geographic assignment of the calling and called party telephone numbers and the associated local rate center configuration. Qwest rates calls according to the dialed digits employing NPA-NXX, but not exclusively. For example, 8XX, N11 (411, 911), 0+ and 0-, 00, 101XXXX+ are routed and rated according to the standard designations of the public switched network. Another exception to this would be the rating of FX service, which constitutes less than 0.2% of Qwest's Washington access lines. Foreign Exchange (FX) service is a combination of rate elements from the Local Exchange tariffs and Private Line Transport tariffs and/or catalogs. The customer purchases an FX connection in the local calling area in which the customer seeks a local number. With FX service, the Qwest FX customer buys a local connection in the Local Calling Area ("LCA") it wants local access to at tariffed local exchange rates and bears the full financial responsibility, at tariffed rates, to transport the call back to the LCA where the call is answered.

Respondent: Daniel Collins, Staff Advocate

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-021

REQUEST:

Please describe how "VNXX" service is different than foreign exchange service from the point of view of the end user who is making a call to a customer of "VNXX" or foreign exchange service. For example please describe whether and how an end-user would know the difference between a call it places to a foreign exchange customer verses a call placed to a customer of "VNXX" service.

RESPONSE:

The end user is unaware of whether a call is a VNXX or FX call. However, the end-user's perception of the call is irrelevant to determining the appropriate intercarrier compensation mechanism. One example that illustrates this point is the requirement in Washington that carriers allow end-users to dial any 10-digit call as a 1+ call. Carriers are required to complete that call regardless of whether the call is a local call or a long distance call to which toll charges apply. For local calls completed in this manner, no toll charges are assessed. Intercarrier compensation in this case is based on the nature of the call as either local or long distance, based on the NPA/NXX of the calling and called parties, and their geographic locations. It is not based on the customer perception of whether the call might be a toll call because the subscriber dialed it using a 1+.

Respondent: Larry Brotherson

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-022

REQUEST:

Please identify each carrier to whom Qwest delivers what Qwest considers to be "VNXX" traffic over trunk groups other than local interconnection service ("LIS") trunks. For each such carrier, please identify the type of trunk group over which Qwest delivers that traffic and the date on which Qwest began to deliver "VNXX" traffic over that trunk group.

RESPONSE:

Qwest objects to this data request to the extent it requests carrier-specific information about other CLECs. Without waiver of this objection, Qwest states that it considers VNXX traffic to be traffic that is interexchange in nature that is inappropriately routed over LIS facilities (giving the appearance that long distance calls are local). As such, Qwest identifies inappropriately routed VNXX traffic over LIS facilities where the called and calling parties are in different local calling areas. If Pac-West were to properly assign numbers in accordance with exchange boundaries and geographic local calling areas, this "VNXX" would be properly identified as toll, and routed over trunk groups other than LIS, i.e. Feature Group D Switched Access trunks. Qwest would not need to identify the traffic as VNXX, as the traffic would be considered switched access traffic and accurately identified as toll. These calls would be subject to the access provisions that govern interexchange toll traffic.

Respondent: Larry Brotherson

QWEST CORPORATION

STATE:	Washington
DOCKET NO:	Docket No. UT-053036
CASE DESCRIPTION:	Pac-West Telecomm, Inc. v. Qwest Corporation
INTERVENOR:	Pac-West Telecomm, Inc.
REQUEST NO:	PWT 01-023

REQUEST:

Please identify the dates on which Qwest (a) established Qwest's position that what Qwest considers to be "VNXX" traffic is not local or ISP-bound traffic subject to reciprocal compensation or the compensation mechanism in the FCC's ISP Remand Order; (b) first notified interconnecting carriers of Qwest's position; and (c) began withholding payment on bills from any interconnecting carrier for compensation for what Qwest considers to be VNXX traffic pursuant to Qwest's position and/or notification.

RESPONSE:

(a) Qwest has taken the position that VNXX calls to ISPs are not local and are not subject to Reciprocal Compensation as early as February 2003. Since the ISP Remand Order, Qwest has paid and continues to pay for calls to ISPs within the local calling area. When identified, however, Qwest excludes VNXX calls as non local calls.

(b) Qwest notified interconnecting carriers of Qwest's position on VNXX traffic on January 25, 2005.

(c) The first payment Qwest withheld for what Qwest considered to be VNXX traffic was associated with 2004 MOU in January 2005.

Respondent: Larry Brotherson

B

[Service Date January 2, 2003]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET NO. UT-023043
LEVEL 3 COMMUNICATIONS, LLC,	)	FIFTH SUPPLEMENTAL ORDER
and	)	ARBITRATOR'S REPORT AND DECISION
CENTURYTEL OF WASHINGTON, INC.,	)	
Pursuant to 47 U.S.C. Section 252.	)	
. . . .	)	

Synopsis*—This Arbitration decision determines that: (1) ISP-bound traffic is not subject to different interconnection requirements than local traffic and does not require a separate agreement; (2) the term "local traffic" should be defined to exclude ISP-bound traffic only for purposes of intercarrier compensation requirements; (3) ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand; and (4) the term "bill-and-keep" should be defined in a manner consistent with the FCC's ISP Order on Remand and implemented by the parties' interconnection agreement in a manner consistent with the FCC's order.*

I. BACKGROUND

A. Procedural History

1 On March 4, 2002, Level 3 Communications, LLC (Level 3) initiated negotiations with CenturyTel of Washington, Inc. (CenturyTel) with the intention to achieve an Interconnection Agreement between Level 3 and CenturyTel in Washington.

On August 8, 2002, Level 3 filed with the Commission a petition for arbitration pursuant to 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (Act).

2 Level 3 is a Competitive Local Exchange Carrier (CLEC) that wishes to establish local interconnection to provide direct inward dialing capability to its Internet Service Provider (ISP) customers in Washington. CenturyTel is a rural incumbent local exchange company (ILEC) as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services in various local exchange areas in Washington. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251-252 and RCW 80.36.610. The parties have negotiated and agreed to the majority of terms that would be included in an interconnection agreement between them. Four issues remain in dispute.

3 The Commission entered an Order on Arbitration Procedure and appointed an Arbitrator on August 16, 2002. The procedural order is consistent with the Commission's Interpretive and Policy Statement that establishes guidelines for conducting arbitrations under the Act, as codified.[1]

4 CenturyTel filed its response to Level 3's petition on September 3, 2002. On September 24, 2002, the Arbitrator held a prehearing conference to establish a procedural schedule and to consider other matters that would facilitate an efficient arbitration process. On September 27, 2002, the Arbitrator entered the Second Supplemental Order: Pre-Arbitration Conference Order. The Second Supplemental Order included a schedule agreed to by the parties.

5 The Second Supplemental Order also required the parties to file briefs to address CenturyTel's contention that the Commission lacks jurisdiction to conduct this

[1] *Implementation of Certain Provisions of the Telecommunications Act of* 1996, Docket No. UT-960269, Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 1996).

arbitration. The Arbitrator certified the question to the full Commission. On October 28, 2002, the Commission entered its Third Supplemental Order Confirming Jurisdiction.

6 Level 3 and CenturyTel filed their respective direct testimonies and exhibits on October 18, 2002, and their respective rebuttal cases on November 1, 2002. The exhibit list attached to this Report as Appendix A reflects the admission of these documents at hearing, and the admission of various exhibits that were introduced on cross-examination during the arbitration hearing.

7 The Commission conducted its arbitration hearing on October 28, 2002, before Administrative Law Judge Dennis J. Moss. The parties filed briefs on November 7, 2002.

B. Appearances.

8 Michael R. Romano, attorney, Level 3 Communications, LLC, McLean, Virginia, and Rogelio E. Peña, Peña & Associates, LLC, Boulder, Colorado, represent Level 3 Communications. Calvin K. Simshaw, Associate General Counsel, CenturyTel, Vancouver, Washington, represents CenturyTel.

C. Unresolved Issues

9 CenturyTel and Level 3 have engaged in largely successful negotiations toward an interconnection agreement. Although Level 3's Petition stated 15 issues to which the parties had not agreed, the number was reduced to 4 by the time of the arbitration hearing. The Arbitrator commends the parties for their substantial progress toward agreement.

10 The issues, as stated in the parties' briefs, are:

> ISSUE ONE: Is ISP-bound traffic subject to different interconnection requirements than local traffic under federal law such that it should be handled by separate agreement?
>
> ISSUE TWO: What is the proper definition of "local traffic"?
>
> ISSUE THREE: What is the proper treatment of Foreign Exchange or "Virtual NXX" Traffic for intercarrier compensation purposes?
>
> ISSUE FOUR: How should the parties define "bill-and-keep" to implement the FCC's *ISP Order on Remand*?[2]

D. Resolution of Disputes and Contract Language Issues

11 As a general matter, the Arbitrator's report is limited to the disputed issues presented for arbitration. *47 U.S.C. § 252(b)(4)*. The parties were required to present proposed contract language on all disputed issues to the extent possible, and the Arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions. Each decision by the Arbitrator is qualified by discussion of the issue. Contract language adopted pursuant to arbitration remains subject to Commission approval. *47 U.S.C. § 252(e).*

12 This Report is issued in compliance with the procedural requirements of the Act, and it resolves all issues that the parties submitted to the Commission for arbitration. The parties are directed to resolve all other existing issues consistent

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order,* 16 FCC Rcd. 9151, 9188, ¶ 81 (2001) ("*ISP Order on Remand*"), *remanded WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

with the Arbitrator's decisions. If the parties are unable to submit a complete interconnection agreement due to an unresolved issue they must notify the Commission in writing prior to the time set for filing the Agreement. At the conclusion of this Report, the Arbitrator addresses procedures for review to be followed prior to entry of a Commission order approving an interconnection agreement between the parties.

II. MEMORANDUM

A. The Commission's Duty Under the Telecommunications Act of 1996

13 Two central goals of the Telecommunications Act are the nondiscriminatory treatment of carriers and the promotion of competition. The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. *47 U.S.C. § 251(c)(1).* Each interconnection agreement must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part. *47 U.S.C. § 252(d).*

B. Standards for Arbitration

14 The Telecommunications Act provides that in arbitrating interconnection agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. *47 U.S.C. § 252(c).*

C. Background

15 Level 3 is a facilities-based competitive local exchange carrier ("CLEC") that provides telecommunications services in Washington and throughout the United States. Through its own network and interconnection with other LECs, Level 3 provides customers local connectivity to packet-switched networks like the Internet. Level 3 provides its customers a direct inward dial ("DID") service, whereby the customer is provided a local telephone number that directs the end-user's calls from his/her local exchange carrier to the Level 3 network. Level 3's DID service requires that it "turn up" local numbers within its target markets, through assignment of "NXX" codes specific to the geography of its target market.[3]

16 CenturyTel is an incumbent provider of local exchange services in Washington, and in several other states. CenturyTel is a "telecommunications company" and a "public service company," as those terms are defined in RCW 80.04.010, and an Incumbent Local Exchange Carrier ("ILEC") under 47 U.S.C. § 251(h). Certain of CenturyTel's operating divisions are entitled to the rural exemption under 47 U.S.C. § 251(f)(1)(A), and therefore not subject to the requirements of 47 U.S.C. § 251(c).

17 Level 3 plans to establish a telecommunications network in Washington that is based on proprietary technology optimized to transmit Internet Protocol (IP) packet-switched traffic. Level 3's proposed network can be used to provide several different telecommunications services, but its initial focus is on providing service to Internet Service Providers (ISPs) that require a local calling presence to serve their own end users whether or not the ISP is physically located in the ISP customer's local calling area.

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[3] *See generally* Direct Testimony of Timothy J. Gates, Exhibit No. 1, at 7:10-22.

18 The issues in this proceeding involve traffic that would originate on CenturyTel's telephone network when a CenturyTel customer dials a seven-digit telephone number, using so-called virtual NXX capability, to connect to the customer's chosen ISP. Level 3 would route the call over its network to the ISP's modem bank that may be physically located in another exchange or even in another state. The ISP then routes the call to one or more Internet sites during the course of the customer's Internet session.

D. Issues, Discussion, And Decisions

1. Is ISP-bound traffic subject to different interconnection requirements than local traffic under federal law such that it should be handled by separate agreement?

19 CenturyTel initially framed this issue in terms of jurisdiction, asserting "ISP-bound traffic is not within the jurisdiction of the state PUCs."[4] On brief, CenturyTel continues to insist that "Level 3's traffic would not be local and therefore, . . . should not be subject to a local interconnection agreement under the provisions of sections 251 and 252 of the Act."[5]

20 The Commission resolved the question of its jurisdiction in its Third Supplemental Order, in part, as follows:

> We agree with Level 3 that the FCC preempted state commission authority over compensation for ISP-bound traffic, and did not preempt state commission authority to arbitrate other issues relating to ISP-bound traffic.

[4] *CenturyTel Response at 3.*
[5] *CenturyTel Brief at 16.*

> The Commission determines that the FCC's ISP Remand Order does not preempt our jurisdiction to arbitrate issues regarding CenturyTel's obligation to interconnect with Level 3 to facilitate ISP-bound traffic. The FCC preempted only the Commission's authority to arbitrate the compensation for ISP-bound traffic . . .
>
> [T]he provisions of 47 U.S.C. §§ 251 and 252 apply to both interstate and intrastate services. The obligations of 47 U.S.C. § 251(a) apply to all telecommunications carriers. The duties set forth in 47 U.S.C. §§ 251(b) and (c) apply to "local exchange companies," which include carriers that provide telephone exchange service or exchange access. *47 U.S.C. § 153(26).* "Exchange access" is "the offering of access to telephone exchanges services or facilities for the purpose of origination or termination of telephone toll services." *47 U.S.C. § 153(16).* Therefore, a local exchange company may provide both intrastate and interstate services and fall within the obligations of 47 U.S.C. § 251. State commissions, therefore, are authorized to consider both intrastate and interstate service when arbitrating issues that arise from 47 U.S.C. § 251.

21 Stated in terms of the issue framed by the parties, the Commission's Third Supplemental Order establishes that ISP-bound traffic is not subject to different interconnection requirements than local traffic under federal law such that it should be handled by separate agreement. That result controls for purposes of this Arbitrator's Report and Decision.

22 In general, then, the starting point for the parties' interconnection agreement should be CenturyTel's standard template interconnection agreement, not the CenturyTel "Information Access Traffic Exchange Agreement" that CenturyTel apparently tendered to Level 3 at some point during the parties' negotiations.[6]

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[6] *See CenturyTel Response at 2.*

The interconnection agreement template should be modified to reflect the parties' agreements and the Arbitrator's resolution of the remaining issues, as discussed in this Report and Decision.

2. What is the proper definition of Local Traffic?

23 Level 3's proposed definition of "local traffic," for purposes of an interconnection agreement with CenturyTel, is as follows:

> Traffic that is originated by an end user of one Party and terminates to the end user of the other Party within CenturyTel's then current local serving area, including mandatory local calling arrangements. A mandatory local calling area arrangement, ordered by the Commission, is an arrangement that provides end users a local calling area, Extended Area Service (EAS) or Extended Community Calling (ECC), beyond their basic exchange serving area. Local Traffic does not include optional local calling area's (i.e., optional rate packages that permit the end user to choose a local calling area beyond their basic exchange serving area for an additional fee), referred to hereafter as "optional EAS". Pursuant to applicable law, Local Traffic excludes ISP-bound Traffic for purposes of intercarrier compensation.

24 CenturyTel proposes a definition that would modify Level 3's suggested language as indicated below in legislative format (*i.e.,* deletions indicated by strikethrough, additions indicated by underlining):

> Traffic that is originated by an end user of one Party and terminates to the end user of the other Party within CenturyTel's then current local calling area, including mandatory local calling arrangements. Traffic to or from an end user not within CenturyTel's local calling area will be subject to access charges to the extent it does not

> constitute Information Access Traffic. A mandatory local calling area arrangement, ordered by the Commission, is an arrangement that provides end users a local calling area, Extended Area Service (EAS) or Extended Community Calling (ECC), beyond their basic exchange serving area. Local Traffic does not include optional local calling area's (i.e., optional rate packages that permit the end user to choose a local calling area beyond their basic exchange serving area for an additional fee), referred to hereafter as "optional EAS". Local Traffic excludes Information Access Traffic, including but not limited to Enhanced Service Provider (ESP) and Internet Service Provider (ISP) traffic, Internet, 900-976, etc., and Internet Protocol based long distance telephony.

25 CenturyTel argues that the Arbitrator should reject Level 3's proposed definition "for the simple reason that it includes non-local traffic."[7]

26 Level 3 argues that CenturyTel's proposed definition is both vague and overbroad; that it would exclude from treatment as local traffic several existing and developing Internet protocol based technologies that it would be better to consider on a case-by-case basis as one carrier or another seeks to implement new services.

27 Insofar as it concerns the issues in this proceeding, and the purpose for which Level 3 seeks an interconnection agreement with CenturyTel, Level 3's proposed definition is limited in reach to the one question that truly remains at issue in this proceeding: the treatment of ISP-bound traffic for purposes of intercarrier compensation. Level 3's definition, which would exclude ISP-bound traffic from the definition of local traffic for purposes of intercarrier compensation, is consistent with the FCC's *ISP Order on Remand*.

[7] *CenturyTel Brief at 16.*

28 By contrast, CenturyTel's proposed definition is not narrow in its effect; it includes a sweeping exclusion of various forms of Internet protocol based services that are not squarely at issue in this proceeding and that may not have even been developed yet to the point of any practical application. As Level 3 argues in its brief, the record in this proceeding is inadequate to support adoption of a definition of local traffic that has broad implications in terms of services that Level 3 does not seek to implement through an interconnection agreement with CenturyTel at this time.[8]

29 The FCC's *ISP Order on Remand* discusses, at paragraph 34, the agency's view of the impracticability of using the term "local traffic" as a basis to define parties' respective rights and obligations under Section 251 of the Act: "We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in Section 251(b)(5) or Section 251(g)." In addition, the FCC discusses, at paragraph 51 of the *ISP Order on Remand*, its view that Section 251(i) of the Act offers flexibility in the pricing and regulation of innovative services, and acknowledges the importance of maintaining an open-minded regulatory environment:

> We expect that, as new network architectures emerge, the nature of telecommunications traffic will continue to evolve. As we have already observed, since Congress passed the 1996 Act, customer usage patterns have changed dramatically; carriers are sending traffic over networks in new and different formats; and manufacturers are adding creative features and developing innovative network architectures. Although we cannot anticipate the direction that new technology will take us, we do expect the dramatic pace of change to continue. Congress clearly did not expect the dynamic, digital broadband driven telecommunications

[8] *See generally, Level 3 Brief at 13-20.*

market place to be hindered by rules premised on legacy networks and technological assumptions that are no longer valid.

30 Adopting CenturyTel's proposed definition of local traffic, with its several exclusions, would take us significantly beyond any result that the record on this arbitration can support. Moreover, the exclusions CenturyTel advocates are not well-defined and to adopt them here might have unintended consequences in the future. Indeed, adopting CenturyTel's proposed definition of local traffic conceivably could forestall the introduction of innovative technologies and increased competition in favor of preserving legacy network dominance and a narrower range of service options for customers now and in the future. Such a result could be antithetical to the fundamental goals of competition and innovation that are the driving force behind telecommunications regulatory policy at both the national and the state level.

31 Issue Two is resolved in favor of Level 3's proposed definition of local traffic. The parties must adopt that definition in their interconnection agreement, and must make any other changes in their agreement that are necessary in light of this resolution of Issue Two.

3. What is the proper treatment of Foreign Exchange or "Virtual NXX" Traffic for intercarrier compensation purposes?

32 Both Level 3 and CenturyTel acknowledge that the substance of their dispute turns on the question of compensation. Level 3 contends that the FCC has preempted from state commission determination the question of intercarrier compensation for ISP-bound traffic. Level 3 argues that the *ISP Remand Order* establishes "bill and keep" as the only intercarrier compensation regime that can apply, at least on the interim basis established by the *ISP Remand Order*, for all ISP-bound traffic.

33 CenturyTel, by contrast, asserts that the *ISP Remand Order* applies by its terms only to that segment of ISP-bound traffic that originates in a given local exchange area and terminates at an ISP modem located in the same local exchange area.[9] CenturyTel contends that all other ISP-bound traffic is interexchange traffic that is required to pay access charges to the originating carrier.

34 The straightforward answer to this argument is that the FCC's *ISP Remand Order* is not limited in its effect as CenturyTel urges in its brief. CenturyTel reads too much into certain language it quotes from the D.C. Circuit's reviews of the FCC's first ISP order and the *ISP Remand Order*.[10] While it is true that one of the issues the FCC considers in its order is ISP-bound traffic that reaches a modem bank in the same local exchange area in which the ISP customer resides, the order cannot be fairly read to concern only this subset of ISP-bound traffic.

35 The FCC's *ISP Remand Order* begins with the straightforward statement that: "In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs)." The FCC's order, thus, introduces its subject matter as encompassing all telecommunications traffic delivered to ISPs and not some subset of that universe as CenturyTel contends. The FCC's order is consistent in this regard throughout its discussion and nowhere suggests that it's result is limited to the narrow class of ISP-bound traffic that CenturyTel argues is the scope of its application. It is the case, as CenturyTel argues, that both the FCC and the appeals court refer to the traffic that terminates at an ISP within the caller's local area, but they do so not to limit their scope to this subset of ISP-bound calls. Rather, both emphasize that even when the traffic remains in the local area it is not to be treated for compensation purposes as local traffic.

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[9] *CenturyTel Brief at 12 ("the FCC has ruled only that bill and keep should be applied where traffic is bound for an ISP located within the local calling area").*

[10] *See CenturyTel Brief at 12-13 and cases cited therein: Bell Atlantic Telephone Companies v. FCC*, 206 F.3d. 1 (D.C. Cir. 2000); *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. May 3, 2002).

4. How should the parties define "bill-and-keep" to implement the FCC's *ISP Order on Remand*?

36 CenturyTel argues that bill-and-keep is not the appropriate compensation scheme for Level 3's ISP-bound traffic. CenturyTel proposes the following definition for bill-and-keep with the intent to exclude ISP-bound traffic from such compensation under the parties' interconnection agreement:

> 1.11 <u>Bill-and-Keep Arrangement</u>
> A compensation arrangement whereby the Parties do not render bills to each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging among or between said carriers for such traffic exchange.

Given the resolution of the first three issues in this arbitration, discussed above, and considering the intent of CenturyTel's proposed definition, it is rejected.

37 Level 3 proposes to define bill-and-keep as follows:

> 1.11 <u>Bill-and-Keep Arrangement</u>
> A compensation arrangement whereby the Parties do not render bills to each other for the termination of Local Traffic specified in this Agreement and whereby the Parties terminate local exchange traffic originating from end-users served by the networks of the other Party without explicit charging among or between said carriers for such traffic exchange in which neither of the Parties charges the other for terminating traffic that originates on the other network. Instead, each Party recovers from its own end users the cost of both the originating traffic that it delivers to the other Party and terminating traffic that it receives from the other Party.

Additionally, at Article V, Section 3, Level 3 proposes to include the following language:

> 3.2.1 Mutual Compensation.
>
> ...
>
> Any compensation due between the Parties in connection with the exchange of Information Access Traffic minutes shall be in accordance with the FCC's Order on Remand and Report and Order in CC Dockets Nos. 96-98 and 99-68, as released on April 27, 2001, and other provisions of applicable law. Pursuant to the FCC's Order on Remand and Report and Order in CC Dockets Nos. 96-98 and 99-68, ISP-Bound Traffic shall be subject to a Bill-and-Keep Arrangement.
>
> 3.2.2 Bill-and-Keep.
>
> ...
>
> Nothing in this Section 3.2.2 shall be interpreted to (i) change compensation set forth in this Agreement for traffic or services other than Local Traffic, including but not limited to internetwork facilities, access traffic or wireless traffic, or (ii) allow either Party to aggregate traffic other than Local Traffic for the purpose of compensation under the Bill-and-Keep Arrangement described in this Section 3.2.2, except as set forth in Section 3.1 above.

The *ISP Order on Remand* takes from the Arbitrator's hands any decision regarding the appropriate compensation mechanism for the exchange of ISP-bound traffic. Bill-and-keep is what the FCC's order requires, at least on an interim basis. The Arbitrator's task is to ensure that the parties' interconnection agreement includes terms that are consistent with what the FCC requires in this regard. Level 3's proposed definition of bill-and-keep and the additional language it proposes for Article V, Section 3, are consistent with the *ISP Order on Remand.* Level 3's proposals are adopted.

E. Additional Issues Raised On Brief.

38 CenturyTel raises two issues on brief that were not presented for arbitration. CenturyTel contends that Level 3 should be bound to establish points of interconnection within CenturyTel's local calling areas.[11] CenturyTel argues that "Level 3 in this proceeding repeatedly made the commitment that it would agree" to this arrangement, and any interconnection agreement should contain point of interconnection language that is consistent with Level 3's commitment. It is neither necessary, nor appropriate that there be any arbitration award on this point. If, as CenturyTel contends, Level 3 has unequivocally committed itself to such an arrangement, an arbitration award would add nothing to that commitment. If, however, there is some dispute over this point, the parties must endeavor to work it out between themselves or queue the matter up for Commission determination with appropriate notice so that a proper record can be developed to support a reasoned decision.

39 CenturyTel also contends that "any local interconnection agreement imposed by the Commission should include language limiting the traffic to be exchanged to ISP-bound traffic."[12] Again, it is neither necessary nor appropriate that there be any arbitration award on this point. As CenturyTel observes in its brief, Level 3's Vice President of Public Policy, Mr. Hunt, testified that Level 3 would agree to have the language of the parties' interconnection agreement note that the agreement, at least initially, is limited to service for ISP-bound traffic.[13]. However, to the extent there is any disagreement between the parties on this point, the matter was not properly put before the Arbitrator for decision and it will not be resolved here.

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[11] *CenturyTel Brief at 17.*
[12] *Id. at 18.*
[13] *Transcript at 134.*

F. Implementation Schedule

40 Pursuant to 47 U.S.C. § 252(c)(3), the Arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In preparing an agreement for submission to the Commission for approval, the parties may include an implementation schedule. In this case the parties did not submit specific alternative implementation schedules. Specific provisions to the agreement, however, may contain implementation time-lines. The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Act, applicable FCC Rules, and this Commission's orders.

G. Conclusion

41 The Arbitrator's resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). The parties are directed to submit an interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

42 Any party may petition for Commission review of this Arbitrators' Report and Decision by January 21, 2003. Any petition for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrators' Report and Decision should be modified. Replies to any petition for Commission review may be filed by January 31, 2003.

43 By January 31, 2003, the parties also must file a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all negotiated terms, all terms requested pursuant to Section 252(i), and all terms intended to fully implement arbitrated decisions. This filing will

include the parties' request for approval, subject to any pending petitions for review.[14] The Agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text.

44 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers, are consistent with the public interest, convenience, and necessity, and are consistent with applicable state law requirements, including relevant Commission orders.

45 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders. A party that petitions for review must provide alternative language for arbitrated terms that would be affected if the Commission grants the party's petition.

46 Any petition for review, any response, and/or any request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must be attached for the convenience of the Commission. The parties are not required to file a proposed form of order.

47 Any petition for review of this Arbitration Report and Decision and any response to a petition for review must be filed (original and six (6) copies) with the Commission's Secretary and served as provided in WAC 480-09-120. Post-arbitration hearing filings and any accompanying materials must be served on the opposing party by delivery on the day of filing, unless jointly filed.

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[14] If the parties agree that no petition for review will be filed, the parties may file their joint request for approval and complete interconnection agreement at any time after the date of this Report and Decision.

48 An electronic copy of all post-arbitration hearing filings must be provided by e-mail delivery to records@wutc.wa.gov. Alternatively, Parties may furnish an electronic copy by delivering with each filing a 3.5-inch, IBM-formatted, high-density diskette including the filed document(s), in Adobe Acrobat file format (*i.e.*, <filename>.pdf), reflecting the pagination of the original. Please also provide the text in either MSWord file format (*i.e.*, <filename>.doc) or WordPerfect file format (*i.e.*, <filename>.wpd). Attachments or exhibits to pleadings and briefs that do not pre-exist in an electronic format do not need to be converted.

2. Approval Procedure

49 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.[18]

50 Any person who wishes to comment on a request for approval may do so by filing written comments with the Commission no later than 10 days after the date a request for approval is filed. Comments must be served on all parties to the Agreement, and parties to the Agreement may file written responses to comments within 7 days after service.

51 The Commission will consider the request(s) for approval at a public meeting. Any person may appear at the public meeting to comment on the request(s). The Commission may set the matter for consideration at a special public meeting.

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[18] *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT-960269, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996 (June 28, 1996).

52 The Commission will enter an order approving or rejecting the Agreement within 30 days after the parties' interconnection agreement is filed. The Commission's order will include its findings and conclusions

Dated at Olympia, Washington, and effective this 2nd day of January 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Arbitrator

APPENDIX A

EXHIBIT LIST

NUMBER		A/R	DATE	DESCRIPTION
LEVEL 3				
1	Timothy J. Gates	A	11/7/02	TJG-1T: Prefiled Direct Testimony
2	Timothy J. Gates	A	11/7/02	TJG-2: Witness Qualifications
3	Timothy J. Gates	A	11/7/02	TJG-3T: Rebuttal Testimony
4	Timothy J. Gates	A	11/7/02	TJG-4: Summary of the Number of NXXS Used by Washington ICOS
5	Timothy J. Gates	A	11/7/02	TJG-5: CenturyTel Service Information
6	CenturyTel Cross	A	11/7/02	Inter-exchange Transport Diagram
7	William P. Hunt	A	11/7/02	WPH-1T: Prefiled Direct Testimony
8	William P. Hunt	A	11/7/02	WPH-2: Powell: Time to 'Retool' the FCC
9	William P. Hunt	A	11/7/02	WPH-2: Remarks of Commissioner Susan Ness
10	William P. Hunt	A	11/7/02	WPH-4: Rebuttal Testimony
11	CenturyTel Cross	A	11/7/02	Tariff WN U-2 (excerpt)
CENTURY TEL				
12	R. Craig Cook	A	11/7/02	RCC-1T: Direct Testimony
13	R. Craig Cook	A	11/7/02	RCC-2: Level 3 Market Expansion Project Key Facts and Information
14	R. Craig Cook	A	11/7/02	RCC-3: Central Office Code Assignment Guidelines
15	R. Craig Cook	A	11/7/02	RCC-4: Level 3 Products and Services Overview

16	R. Craig Cook	A	11/7/02	RCC-5: Level 3 NPA-NXXs in Washington
17	R. Craig Cook	A	11/7/02	RCC-6: Level 3's 3-Connect Modem Product Brochure
18	R. Craig Cook	A	11/7/02	RCC-7: Rebuttal Testimony
19	Level 3 Cross	A	11/7/02	Ocosta Diagram
20	Level 3 Cross	A	11/7/02	Ocosta/Seattle Diagram 1
21	Level 3 Cross	A	11/7/02	Ocosta/Seattle Diagram 2
22	Level 3 Cross	A	11/7/02	Ocosta/Seattle Diagram 3
23	Level 3 Cross	A	11/7/02	Ocosta/Seattle Diagram 4
24	William H. Weinman	A	11/7/02	WHW-1T: Direct Testimony
25	William H. Weinman	A	11/7/02	WHW-2: Use of CenturyTel's Network
26	William H. Weinman	A	11/7/02	WHW-3T: Rebuttal Testimony
27	Level 3 Cross	A	11/7/02	Ocosta/Aberdeen Diagram
28	Level 3 Cross	A	11/7/02	Ocosta/Aberdeen/Seattle Diagram
29	Level 3 Cross	A	11/7/02	CT Exchange A Diagram
30	Level 3 Cross	A	11/7/02	Ocosta/Seattle Diagram 5